IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: 3389/2017

4/3/2020

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE
SIGNATURE

In the matter between:

A[….] J[….] V[….] Plaintiff

And

M[….] V[….] Defendant

JUDGMENT

Maumela J.

1. This is a divorce which is opposed. The Plaintiff is an adult male business man, residing at No. [….].
   The Defendant is an adult female employed as a Human Resources Planner by the [….] at [….], Pretoria, Gauteng and residing at [….], Pretoria, Gauteng.

2. The Plaintiff requests division of the joint estate whilst the Defendant requests an order for the forfeiture of the patrimonial benefits of the marriage in community of property to be granted against the Plaintiff.[1] It is common cause that the parties got married in community of property and of profit and loss and that their marriage still subsists. There is also no dispute about that fact that the marriage relationship between the two has broken down irretrievably.

3. Both parties level blame; the one against the other for the irretrievable brake down of their marriage relationship. The Defendant launched a counterclaim against the plaintiff in which she seeks an order of forfeiture of the marital benefits against the Plaintiff in terms of Section 9(1) of the Divorce Act[2]. The Plaintiff opposes the counter-application for forfeiture.

4. There is no dispute between the parties about the fact that they are married to one another in community of property and of profit and loss. H. R. Hahlo[3] describes community of property as follows: *"Community of property is a universal economic partnership of the spouses. All their assets and liabilities are merged in a joint estate, in which both spouses, irrespective of the value of their financial contributions, hold equal shares."*[4]

5. Our law expresses clearly on the aspect of the consequences of contracting into a marriage in community of property and of profit and loss. There is also legal certainty about positive steps spouses ought to take who contract into marriages in the

[1] Pleadings: Counterclaim prayer 2 p19
[2]. Act No 70 OF 1979.
[3]. A renowned author in Customary Law.
[4]. In his book: The South African Law of Husband and Wife 5th edition, at pages 157-8.

event where they do not wish to subject themselves to a marital regime which entails community of property and of profit and loss. It is trite that in South Africa, community of property and of profit and loss is the applicable marital regime unless the couple contracting into marriage expressly exclude it by way of entering into an *ante nuptial* contract.

6. It is common cause that in this case, the parties did not contract into any *ante-nuptial* contract. It is for that reason that when the Plaintiff in this case sued for divorce, the Defendant launched a counter-application, seeking an order for the Plaintiff to forfeit his patrimonial benefits of the marriage between him and the Defendant, in community of property. hhhhhhhhhhhhhhhhhhhhhhhhhhhhhhhhhh
7. Patrimonial benefits of the marriage in community of property between the parties are declared to have been forfeited by the Plaintiff in favour of the Defendant and more particularly the benefits with regard to the Defendant's house situated at [….], Pretoria, Gauteng, as well as the Defendant's Government Service Pension Fund.

8. In the case of *Engelbrecht v Engelbrecht*[5], the headnote reads as follows: *"Joint ownership of another party's property is a right which each of the spouses acquires on concluding a marriage in community of property. Unless the parties, (either before or during the marriage), make precisely equal contributions the one that contributed less shall on dissolution of the marriage be benefited above the other if forfeiture is not ordered. This is the inevitable consequence of the parties' matrimonial property regime."*

9. Section 9 (1) of the Divorce Act[6] provides as follows:
   "Forfeiture of patrimonial benefits of marriage.
   (1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour

[5].1989 (1) SA 597 (C),
[6]. Supra.

of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited."

10. The court may order forfeiture only if it is satisfied that the one party will, in relation to the other, be unduly benefited.[7] A party claiming forfeiture must "plead the necessary facts to support that claim and formulate a proper prayer in the pleadings to define the nature of the relief sought".[8] Thus the *onus* is on the applicant for a forfeiture order to prove the nature and the ambit of the benefit to be forfeited, and in so doing the applicant must prove the extent to which it is an undue benefit.[9]

11. Similarly, the allegation of undue benefit must be pleaded and proven. Our law has held that it would not be enough simply to refer to the acquisition of an asset and then make the bald allegation that the party against whom forfeiture is claimed will be unduly enriched at the expense of the other if forfeiture is not granted[10] In exercising the discretion to order forfeiture, the court is enjoined to ask itself whether one party would be unduly benefited were such an order not made.[11]

12. The court may order forfeiture only if it is satisfied that the one party will, in relation to the other, be unduly benefited.[12] A party

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[7]. *Engelbrecht* supra; *Swanepoel* [1996] 3 All SA 440 (SE); JW v SW 2011 1 SA 545 (GNP).
[8]. *Koza* 1982 3 SA 462 (T) 465.
[9]. *Engelbrecht supra.*
[10]. *Matyila* 1987 (3) SA 230 (W), 235E–F; *Swanepoel supra* 444; *MG v RG* 2012 2 SA 461 (KZP) paras 33–37.
[11]. *Matyila* 1987 3 SA 230 (W) and *Klerck supra*. In *Klerck* there was no substantial misconduct on the part of either of the parties, and what principally influenced the court in its refusal to order forfeiture was that this had been a marriage of short duration. The marriage in *Wijker,*1993 4 SA 720 (A). *supra* was of long duration (35 years). Yet the attempt to obtain a forfeiture order in respect of the husband's half share in the company started by his wife failed, because the parties were married in community, and there was no evidence to support a finding of substantial misconduct on the husband's part. Moreover, the Appellate Division (as it then was) in *Wijker* pointed out that the so-called "principle of fairness" was not one of the criteria mentioned in s 9(1), and therefore could not be considered in deciding whether to grant a decree of forfeiture.
[12]. *Engelbrecht supra*; *Swanepoel* [1996] 3 All SA 440 (SE); *JW v SW* 2011 1 SA 545 (GNP).

claiming forfeiture must "plead the necessary facts to support that claim and formulate a proper prayer in the pleadings to define the nature of the relief sought".[13] Thus the *onus* is on the applicant for a forfeiture order to prove the nature and the ambit of the benefit to be forfeited, and in so doing, the applicant must prove the extent to which it is an undue benefit.[14] Similarly, the allegation of undue benefit must be pleaded and proven. It would not be enough simply to refer to the acquisition of an asset and then make the bald allegation that the party against whom forfeiture is claimed will be unduly enriched at the expense of the other if forfeiture is not granted.[15]

13. In exercising the discretion to order forfeiture, the court is enjoined to ask itself whether one party would be unduly benefited were such an order not made.[16] In answering this question, the court should consider factors such as the following:
    (i). the duration of the marriage or civil union;
    (ii). the circumstances that gave rise to the break-down of the marriage or civil union; and
    (iii). any substantial misconduct on the part of either of the parties and the fact that an undue benefit may accrue to the one party in relation to the other if an order of forfeiture is not granted.

14. The court has a wide discretion in that it may order forfeiture in respect of the whole or part only of the benefits.[17] The discretion is restricted to a consideration of these grounds

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[13]. *Koza* 1982 3 SA 462 (T) 465.
[14]. *Engelbrecht supra.*
[15]. *Matyila supra* 235E–F; *Swanepoel supra* 444; *MG v RG* 2012 2 SA 461 (KZP) paras 33–37
[16]. *Matyila* 1987 3 SA 230 (W) and *Klerck supra*. In *Klerck* there was no substantial misconduct on the part of either of the parties, and what principally influenced the court in its refusal to order forfeiture was that this had been a marriage of short duration. The marriage in *Wijker supra* was of long duration (35 years). Yet the attempt to obtain a forfeiture order in respect of the husband's half share in the company started by his wife failed, because the parties were married in community, and there was no evidence to support a finding of substantial misconduct on the husband's part. Moreover, the Appellate Division (as it then was) in *Wijker* pointed out that the so-called "principle of fairness" was not one of the criteria mentioned in s 9(1), and therefore could not be considered in deciding whether to grant a decree of forfeiture.
[17]. *Old Mutual Life Assurance Co (SA) Ltd v Swemmer* 2004 5 SA 373 (SCA)

alone. No other factors may be taken into account.[18] The Appellate Division in the case of *Wijker*[19], pointed out that the so-called "principle of fairness" was not one of the criteria mentioned in s 9(1), and therefore could not be considered in deciding whether to grant a decree of forfeiture.

15. The finding of substantial misconduct on the part of the defendant is not a *sine qua non* for the granting of a forfeiture order.[20] Indeed, care must be taken not to elevate misconduct to a consideration higher than the basic requirement of undue benefit. Substantial misconduct may include conduct that has nothing at all to do with the breakdown of the marriage and may for that reason have been included as a separate factor. But, as the Appellate Division in *Wijker*[21] cautioned; misconduct which is not of a serious nature should be accorded too much importance.

16. While the duration of the marriage and the reasons for the breakdown may be clearly inferred from the plaintiff's summons or plaintiff-in-reconvention's counterclaim, the evidence concerning "substantial misconduct" cannot be simply inferred from the facts alleged. Thus, for example, adultery may support an allegation on the breakdown of the marriage, but it is not necessarily "substantial misconduct" for the purposes of a forfeiture order.[22] It must be conduct that is "so obvious and gross that it would be repugnant to justice to let the guilty spouse get away with the spoils of the marriage".[23] The proof of substantial misconduct is not a *sine qua non* for the granting of a forfeiture order.[24]

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18. Botha 2006 4 SA 144 (SCA).
19. *Wijker* Supra.
20. The issue has now been resolved in *Binda* 1993 2 SA 123 (W) who held that *Matyila* had been wrongly decided and that substantial misconduct was indeed not a *sine qua non* for the granting of a forfeiture order. The view adopted in *Binda* received the support of the Appellate Division (as it then was) in *Wijker* 1993 4 SA 720 (A).
21. Supra at page 729J–730B.
22. *Wijker supra* 730.
23. *Singh* 1983 1 SA 787 (C) 788H; *Matyila supra* 235A.
24. *Engelbrecht* 1989 1 SA 597 (C); *Klerck* 1991 1 SA 265 (W); *Binda* 1993 2 SA 123 (W); *Wijker supra*; *Swanepoel supra* 443.

17. A forfeiture order may not be granted simply to balance the fact that one of the spouses or partners has made a greater contribution than the other to the joint estate.[25] A forfeiture order may not be granted simply to balance the fact that one of the spouses or partners has made a greater contribution than the other to the joint estate.[26]

18. Since "substantial misconduct" is mentioned with regard to forfeiture in terms of section 9(1) of the Divorce Act, it is arguable that a greater degree of misconduct is required than for purposes of calculating a maintenance award in terms of section 7(2), where only "misconduct" specifically in relation to the break-down of the marriage may be considered. But a finding of substantial misconduct under section 9(1) will inevitably require a consideration of the gravity of the conduct that gave rise to the break-down of the marriage.[27]

19. In the case of *Beaumont v Beaumont*[28] it was held that in many, and probably in most cases; blame will attributable to both parties in that both parties are likely to have contributed to the breakdown of the marriage. In such a case where there is no conspicuous disparity between the conduct of the two parties, the court will not indulge in an exercise to apportion fault between the parties; thus nullifying the advantages of the no-fault system in divorce matters.

20. In *Wijker v Wijker*[29] the Appellate Division stated the following: *"The only remaining factor which persuaded the Court a quo to grant the forfeiture order is that it was considered unfair that the appellant should share in the company and its assets while he had made hardly any contribution towards its management, administration and profit-making. The finding that the appellant would be unduly benefited if a forfeiture order was not made, was therefore based on a principle of fairness. It seems to me that*

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[25]. *Engelbrecht supra* 601.
[26]. *Engelbrecht supra* 601.
[27] *Wijker supra* 729J–730B.
[28]. 1987 (1) SA 967 (A).
[29]. [1993] 4 All SA 857 (AD).

the learned trial Judge, in adopting this approach, lost sight of what a marriage in community of property really entails.

21. *The fact that the appellant is entitled to share in the successful business established by the respondent is a consequence of their marriage in community of property. In making a value judgment this equitable principle applied by the Court a quo is not justified. Not only is it contrary to the basic concept of community of property, but there is no provision in the section for the application of such a principle. Even if it is assumed that the appellant made no contribution to the success of the business and that the benefit which he will receive will be a substantial one, it does not necessarily follow that he will be unduly benefited. Compare Engelbrecht v Engelbrecht*[30]*. The benefit that will be received cannot be viewed in isolation, but in order to determine whether a party will be unduly benefited the Court must have regard to the factors mentioned in the section. In my judgment the approach adopted by the Court a quo in concluding that the appellant would be unduly benefited should a forfeiture order not be granted was clearly wrong. It is plain on the evidence that a forfeiture order should not have been* granted."

22. The Defendant testified first. She bore the onus to prove her forfeiture claim. She testified that she is aware of the implications of contracting into a marriage in community of property. That knowledge notwithstanding, she proceeded to get married in community of property.[31] It is only after the marriage relationship between her and the Plaintiff has irretrievably broken down that she now seeks for a different marital regime to find application. For that to be ordered to take place, the Plaintiff had to discharge the onus upon her to prove the elements listed under

23. It is common cause that the parties lived together as husband and wife for a period of at least two years before they got married on the 11th of October 2015. That marriage presently still subsists. The Defendant only filed her counter claim for the

[30]. *1989 (1) SA 597 (C) at 601F-G*
[31]. See page 94 line 24 to page 95 line 19 and Page 98 line 2 to 8.

forfeiture of benefits during March 2017, which is a period of one year and five months after the date of the marriage.

24. In the case of Matyila v Matyila[32]; at page 12, the Court stated the following in this regard: *"The meaning of the words 'duration of marriage' as appearing in s 9(1) aforesaid is clear. It means no more nor less than the period during which the marriage has, from the legal point of view, subsisted, namely from the date of marriage to the date of divorce or, at the very least, to the date of institution of divorce proceedings. This is in accordance with the primary rule of interpretation that words should be understood in their ordinary meaning."*

    It will be submitted that although the marriage was of relative short duration, it was not only eleven months as the Plaintiff testified.

25. The Defendant testified that she and the Plaintiff are equally to blame for the breakdown of their marriage relationship.*[33]* In her pleadings she did not make allegations of misconduct against the Defendant. The Defendant did not prove any misconduct, let alone any substantial misconduct on the part of the Plaintiff. The Plaintiff submits that the Defendant's evidence regarding the Plaintiff's misconduct, is weak. That the Plaintiff contradicted herself and her pleadings. She refused to answer reasonable questions and gave long and irrelevant answers to simple questions that were put to her. She could not explain how many of the facts pleaded by her, could have led to the breakdown of the marriage, or how it can amount to misconduct.

26. The Plaintiff submitted that most of the "misconduct" alleged by the Defendant was watered down in cross examination to such an extent that no weight can be attached thereto. In that regard, the Plaintiff raised the following by way of an example:
    26.1. She conceded that they both verbally abused each other.
    26.2. The Plaintiff submitted that the only incidents of physical

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[32].

[33] Page 105 lines 4 to 9

violence that took place were as a result of the Defendant obstructing or preventing the Plaintiff from leaving. In order to get past her, or to get away from her. He pushed her away because he felt that she is undermining his freedom of movement.[34]

26.3. The Plaintiff contends that the Defendant exaggerated in alleging that he launched anger attacks against her and when his actions resulted in a vehicle accident. He denied that he threatened to commit suicide. The Defendant on the other hand admitted that she attempted to commit suicide. The Plaintiff further argues that the Defendant did not prove that a threat to commit suicide constitutes a misconduct.

26.4. The Plaintiff alleged that the Plaintiff failed to safeguard his firearm. However, she did not prove how this could have intimidated her or contributed to the breakdown of their marriage.

26.5. Despite the fact that this was not pleaded, for the first time under cross-examination, the Defendant alleged that the Plaintiff pointed her with a firearm. She never preferred a criminal charge against him based on this allegation which was an after-thought.

26.6. The Defendant could not explain how the sale of the Plaintiff's house was fraud against her or how that can ever be misconduct.

26.7. The Plaintiff contends that taking care of the Defendant's children cannot amount to misconduct. He denied having used the children to manipulate the Defendant.

26.8. The plaintiff contends that the fact that where the Defendant took care of him in his sickly bed, this does not amount to misconduct on his part.

26.9. It is common cause that the Plaintiff left the common home during September 2016, as a result of the breakdown of the marriage relationship. However, this does not amount to misconduct.

26.10. The Defendant conceded that the Plaintiff went for five

[34] Page 184 line 1 to 20 and page 178 line 15 to page 179 line 2.

sessions of counselling.[35]

26.11. The Defendant conceded that the Plaintiff did contribute to the common household and the estate in so far as he could.[36] She argues that to the extent that the law provides for spouses married in community of property to earn a share even where they contributed little; then the law should be reviewed.

27. The Plaintiff argues that the Defendant failed to prove any misconduct on his part, or that he committed any serious misconduct, as contemplated in Section 9 of the Divorce Act.

28. The Plaintiff disputes that he will be unduly enriched if an order for forfeiture is not granted by the court. He denies that he will be unduly enriched at the expense of the Defendant, merely because he did not contribute to the Defendant's pension fund or that he did not make any payments to the bond account. He makes the point that the allegation of undue benefit must be pleaded and proven. He contends that it would not be enough simply to refer to the acquisition of an asset and then make the bald allegation that the party against whom forfeiture is claimed will be unduly enriched at the expense of the other if forfeiture is not granted. According to the Plaintiff, the mere fact that one of the parties did not contribute to an asset does not necessarily imply that he or she will be unduly benefited.

29. The Plaintiff contends that even if it is assumed that the made no contribution to the Defendant's pension fund and did not make any payments to the bond account, or that the benefit which he will receive will be a substantial one; it does not necessarily follow that he will be unduly benefited. He points out that unless the parties make precisely equal contributions, the one that contributed less shall on dissolution of the marriage be benefited above the other if forfeiture is not

[35] Page 159 line 20 to page 160 line 3

[36] Page 151 line 4 to 10 and 154 line 5 to 12 and page 162 and page 160 line 15 and page 163 and page 169 line 5 to 25

ordered. According to him, this is an inevitable consequence of the parties' matrimonial property regime and it should not be avoided without cogent reasons.

30. In his testimony, the Plaintiff confirmed all the grounds for the breakdown of the marriage relationship as set out in his Particulars of Claim. He denied all allegations made by the Defendant concerning the grounds for the breakdown of the marriage relationship, much as he denied any misconduct on his part. He testified that he earned less money than the Defendant and that he contributed to the common household and estate only to the extent that the dictates of the means available at his disposal from time to time allowed.

31. Under cross-examination, the Plaintiff stood his ground. Two issues were covered:
    - whether he has contributed to the Defendant's pension fund and
    - whether he made any payments to the bond account in respect of the Parties' communal home.

32. The Plaintiff conceded that he did not make any payments to the pension or the bond account. He steadfastly disputed allegations of misconduct on his part.

EVALUATION.

33. It is common cause between the parties that the marriage relationship between them broke down irretrievably. They both level blame; the one against the other, for the irretrievable breakdown. However, fault on the part of any of the parties is of no consequence for purposes of a determination concerning forfeiture of the marital benefits as provided in terms of Section 9(1) of the Divorce Act[37].

34. The Plaintiff's evidence regarding the reasons for the breakdown of the marriage relationship went unchallenged.

[37]. Supra.

The Defendant made several bold statements against the Plaintiff; alleging misconduct on his part. However, she failed to prove misconduct on his part. All she did was to raise issues and incidents that understandably so; must have contributed much in breaking the marriage relationship to an extent that it has become irretrievable. Even at that, acts and omissions that could have led to the irretrievable breakdown of the marriage are attributable to both sides.

35. All of the acts and omissions, several of which were admitted or conceded by both, do not necessarily amount to misconduct. The Plaintiff ended up voicing up nothing more than her mere personal opposition to the fact that the law as it stands provides for a party in a marriage in community of property to benefit if he or she contributed less to the marital property as compared to the other.

36. The Defendant's poor evidence and concessions, failed to prove any misconduct on the part of the Plaintiff. She failed to discharge the onus resting on her to prove her claim for the Plaintiff to be ordered to have forfeited benefits of the marriage in community of property. Section 9 of the Divorce Act provides that a court should when considering an application towards an order for forfeiture of marital benefits take into regard, the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties. Having done so, the court has to satisfy itself that based on that consideration, one party will in relation to the other be unduly benefited if the order for forfeiture is not made.

37. It is trite that the relatively short period of time over which the marriage remained in subsistence does not constitute a reason to grant an order for the forfeiture of the benefits of the marriage in community of property. The court also considers that the Defendant conceded that the Parties are equally to blame for the breakdown of the marriage relationship. On the

other hand, the Defendant did not prove substantial misconduct on the part of the Plaintiff.

38. As the law stands; the fact that the Plaintiff did not contribute to the Defendant's pension fund and did not make any payments to the bond account, does not mean he will be unduly enriched at the expense of the Defendant, if the order is not granted. Consequently, the court finds that allegations of undue benefit have not been pleaded and proven by the Defendant.

39. Undue benefit for the Plaintiff in the event where forfeiture is not ordered has not been proven by the Defendant. Prospects of the Plaintiff benefiting overly out of the division of the marital property are a natural consequence of the marital regime both parties willingly contracted into. The court will not be justified in ordering against it without a legal basis justifying such an order. As indicated before; this is *'an inevitable consequence of the parties' matrimonial property regime'*.

40. Our case-law dictates that a forfeiture order may not be granted simply to balance the fact that one of the spouses or partners has made a greater contribution than the other to the joint estate. Our courts have also held that the "principle of fairness" was not one of the criteria mentioned in s 9(1), and therefore should not be considered in deciding whether to grant a decree of forfeiture.

41. The court finds that the Defendant failed to discharge the onus resting on her to prove her claim for the forfeiture of the benefits of the marriage in community of property. Her counter claim also stands to be dismissed with costs. Of his own accord, the Plaintiff and without conceding that the Defendant is entitled to any forfeiture order, the Plaintiff indicated willingness to forfeit his right to share in the Defendant's pension fund. He seeks for the court not to grant the application for forfeiture regarding the remainder of the joint estate. In the premises the Court makes the following order:

ORDER.

41.1. A decree of divorce is granted;

41.2. The Plaintiff's right to share in the Defendant's pension fund is forfeited;

41.3. Each party is to pay their own costs.

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Maumela J
Judge of the High Court of South Africa.